BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

(Emphases supplied by the writer)

I. THE OPINIONS OF THE COURT BELOW

Petitioner prays for a review of the judgment entered in its cause No. 30852 by the Supreme Court of the State of Oklahoma on February 2, 1943 (R. 81-86). Said decision has not been officially reported, but may be found at 131 Pac. (2d) 745. Said judgment became final on June 15, 1943, when the petition for rehearing was denied (R. 86). A copy of said opinion appears as Appendix "B" hereto.

In said opinion, said appellate court states that the legality of the rates of levies, attacked by this petitioner, has already been established. As authority for that statement said court cites its decision and opinion in *Texas-Empire Pipe Company et al.* v. *Tulsa County Excise Board* (its No. 29210, decided December 17, 1939, rehearing denied July 16, 1940), which is officially reported at page 591, volume 187 of the Oklahoma Reports. Also, it may be found at 104 Pac. (2d) 441. A copy of said opinion appears as Appendix "A" hereto.

II. JURISDICTION

As showing the grounds on which the jurisdiction of this Court is invoked, the statutory provisions, and the decisions relied on, the matter contained in the foregoing petition, under heading II—Jurisdiction is here referred to and

adopted, as a whole, as petitioner's brief in support of its claim that this Court has jurisdiction to review said appellate court's judgment, complained of, and to grant relief as prayed for by petitioner.

III. STATEMENT OF THE CASE

The facts in the case having been stated sufficiently, in the writer's opinion, in the "Summary Statement of the Matter Involved" within the foregoing petition, it is not deemed necessary to burden this brief with repetition. As stating the facts involved in the case, said portion of the petition is adopted to meet the requirements that this brief shall contain a statement of the facts material to this Court's consideration of the questions presented.

Petitioner's complaint that the sum which it seeks to recover was taken without due process of law, and under procedure by which petitioner was denied equal protection of the law, in violation of its rights guaranteed by the Fourteenth Amendment to the Federal Constitution, was explicitly pleaded in the trial court (R. 16) before trial commenced, and, on appeal, said complaint was presented in express terms to the appellate court (R. 90-93).

The rulings of the trial court, and of the appellate court, have already been set forth, respectively, in sub-section 3 of Part II—Jurisdiction in the foregoing petition.

IV. ASSIGNMENTS OF ERROR

Nine assignments of error in the judgment sought to be reviewed are set out on pages 24-26 of this document, as a part of the foregoing petition. Five of said assignments, Nos. 1, 2, 4, 5 and 7 are relied on by petitioner to sustain its application for issuance of the writ prayed for; said assignments are referred to and adopted as a part of this brief.

V. ARGUMENT

SUMMARY OF ARGUMENT

PROPOSITION No. 1.

Where the Court of Tax Review of the State of Oklahoma dismissed a class action attacking legality of rates of certain tax levies on the ground that they were not computed with reference to the total legally assessed valuation of property liable therefor, and the Supreme Court of the State of Oklahoma affirmed said dismissal on the ground that said trial court lacked jurisdiction to consider said ground of complaint, a taxpayer affected by said rates, attacking them on the same ground in a court shown by said Supreme Court decision to have jurisdiction to consider such ground, is deprived of property without due process, and is denied equal protection of the law, when, on appeal from adverse decision, said Supreme Court fails to consider such ground of complaint, but disposes of it by saying that the legality of said rates had been finally determined in said former appeal.

PROPOSITION No. 2.

Where a state court's decision is based on an untenable statement as to a non-federal question of fact, this Court will disregard it and will consider the real and decisive federal question presented to such state court.

PART 1.

The statement that the legality of the involved rates of levy has already been established, relied on in the opinion as a state-

ment of fact barring consideration of the federal question presented, is untenable.

PART 2.

The statement that the appeal record does not contain proof that the assessor's entries on the tax rolls were not in conflict with the record of the action of the assessing board is untenable; it is positively refuted by the record.

PART 3.

The statement that the State Board of Equalization informed itself fully as to situs, extent and value of petitioner's property within the involved taxing units, relied on in the opinion as disposing of petitioner's contentions to the contrary, and, therefore, carrying with it the inferences that such action was taken either consonant with (1) petitioner's return, (2) consent, (3) notice and opportunity for hearing afforded petitioner, or the inference that petitioner had not pleaded and proved the contrary, is untenable; it is positively refuted by the record.

ARGUMENT AND AUTHORITIES

In support of said assigned errors Nos. 1, 2 and 5, petitioner presents the following:

PROPOSITION No. 1.

Where the Court of Tax Review of the State of Oklahoma dismissed a class action attacking legality of rates of certain tax levies on the ground that they were not computed with reference to the total legally assessed valuation of property liable therefor, and the Supreme Court of the State of Oklahoma affirmed said dismissal on the ground that said trial court lacked jurisdiction to consider said ground of complaint, a taxpayer affected by said rates, attacking them on the same ground in a court shown by said Supreme Court decision to have jurisdiction to consider such ground, is deprived of property without due process, and is denied equal protection of the law, when, on appeal from adverse decision, said Supreme Court fails to consider such ground of complaint, but disposes of it by saying that the legality of said rates had been finally determined in said former appeal.

The decision here sought to be reviewed has the effect of holding that petitioner's right to have the legality of the involved rates of levies considered is barred by the Oklahoma Supreme Court's decision of the case of *Texas-Empire Pipe Line Company et al.* v. *Tulsa County Excise Board,* 187 Okla. 591, 104 Pac. (2d) 441. The opinion in said case shows that the court below had refused to consider the asserted ground of complaint for want of jurisdiction and that said Supreme Court's affirmance was based on want of jurisdiction of the trial court. In *Hughes* v. *United States,* 4 Wall. 232, 71 U. S. 232, 18 L. ed. 303, 305, this Court said:

> "* * * In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit. *Walden* v. *Bodley,* 14 Pet. 156; 1 Greenl. Ev. Secs. 529, 530, and authorities there cited" (18 L. ed. 305).

Also, see *Smith* v. *McNeal,* 109 U. S. 426, 27 L. ed. 986.

A decision of the highest court of a state may as effectively deprive a citizen of the protection of the Fourteenth Amendment as may an act of the Legislature. *Scott* v. *McNeal,* 154 U. S. 34, 38 L. ed. 896; *Chicago, Burlington & Quincy R. R. Co.* v. *City of Chicago,* 166 U. S. 226, 41 L. ed. 979.

The Supreme Court of the State of Oklahoma is committed to the principle that termination, on appeal, of an action between the same parties and concerning the same subject-matter by any means other than decision on the merits, shall not be a bar to a second suit. That court, in the case of *Dickson* v. *Taylor et al.*, 129 Okla. 191, 263 Pac. 1102, said:

> "It is urged by the plaintiff that the question above discussed is *res adjudicata*, as having been decided adversely to the defendant in the previous appeal of this case. *Dickson* v. *Taylor and Buck*, 101 Okla. 119, 223 Pac. 143.
>
> "The general rule applicable to this question has been stated to be that a judgment of reversal which does not purport to pass on the merits of the controversy does not operate as *res adjudicata*. An examination of the above opinion discloses that this case was reversed because of the failure of the defendant in error to file a brief. It does not disclose that the case was considered on its merits for the purpose of determining the issues there and here presented. We have a right to examine the record in this case upon that appeal, and though we find that a petition for rehearing was filed and presented, there is nothing in the opinion of the court, nor in the order overruling the petition for rehearing showing the case was considered on its merits, and the questions here presented have, therefore, not become *res adjudicata*. *Clark* v. *First National Bank*, 59 Okla. 2, 157 Pac. 96; *Yale* v. *Noble*, 113 Okla. 106, 239 Pac. 463" (129 Okla. 194).

In addition to its recognition of said rule in the above-quoted case, and in the cases therein cited, said court also recognized the principle in the case of *Howard* v. *Owens*, 142 Okla. 82, 285 Pac. 5, certiorari denied (1930), 282 U. S. 840, 75 L. ed. 746.

This Court will consider that, under Oklahoma law, the dismissal of the former appeal for want of jurisdiction does not conclude petitioner's right to have a determination, on the merits, of its contention that the rates of levies, here involved, are illegal on the ground that they were not computed with reference to the total legally assessed valuation of property liable therefor. *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188.

In support of said assigned errors Nos. 1, 4, 5 and 7, petitioner presents the following:

PROPOSITION No. 2.

Where a state court's decision is based on an untenable statement as to a non-federal question of fact, this Court will disregard it and will consider the real and decisive federal question presented to such state court.

Argument and authorities in support of the stated proposition will be presented under sub-propositions designated as Parts 1, 2 and 3.

PART 1.

The statement that the legality of the involved rates of levy has already been established, relied on in the opinion as a statement of fact barring consideration of the federal question presented, is untenable.

As argument and authority in support of this part of the above-stated proposition, the matter set forth under Proposition No. 1 is referred to and adopted.

The appellate court's reliance on said statement, as a fact, must be recognized as the sole basis for denial of peti-

tioner's complaint against the legality of the rates on the grounds that they were computed without reference to 1938 total assessed valuations of property liable for the taxes. No other conclusion is reasonable. That statement is made in view of the undenied testimony of the county assessor (R. 35), that none of the 1938 assessments of public service corporations, transmitted to him by the State Board of Equalization, showed any valuation for property within any of the four involved taxing units. It follows that no rates of levy for the purposes of said taxing units could have been computed without denying, to every affected taxpayer within said units, the equal protection of the law guaranteed by the Fourteenth Amendment to the Federal Constitution. *Auditor General* v. *Hughitt,* 132 Mich. 311, 93 N. W. 621.

PART 2.

The statement that the appeal record does not contain proof that the assessor's entries on the tax rolls were not in conflict with the record of the action of the assessing board is untenable; it is positively refuted by the record.

In the foregoing petition it was pointed out that the Oklahoma Supreme Court, in so many words, said that the appeal record before it contained no proof that the assessing board affirmatively fixed the taxing situs of petitioner's property other than as reflected by the final tax rolls as made to appear by the county assessor.

In that connection, it also was pointed out that the county assessor testified that the two-page "Summary of Assess-

ment" (R. 65, received in evidence, R. 36) constituted a complete summary of the 1938 assessment of petitioner's property as transmitted to him by the State Board of Equalization, and that all of the school districts mentioned in the various parts of the return are reflected in said summary.

The record contains testimony of plaintiff's witness, T. M. Markley, which was not denied and which was not impaired in any manner, that there was no separation of petitioner's property within School District No. 22 shown in its return *"or in the assessment by the State Board of Equalization"* (R. 53-55).

That being the state of the record, it is submitted that the statements in the appellate court's opinion are, to say the least, erroneous, and petitioner insists that said statements not only have no fair support in the record, but are positively refuted by undisputed facts shown by the record.

It is the province of this Court to inquire not only whether a federal right, properly brought to the attention of a state court, was denied by it in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support. See *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux,* 279 U. S. 737, 73 L. ed. 931, 936; also see cases therein cited.

PART 3.

The statement that the State Board of Equalization informed itself fully as to situs, extent and value of petitioner's property within the involved taxing units, relied on in the opinion as disposing of petitioner's contentions to the contrary, and, therefore, carrying with it the inferences that such action was taken either consonant with (1) petitioner's return, (2) consent, (3) notice and opportunity for hearing afforded petitioner, or the inference that petitioner had not pleaded and proved the contrary, is untenable; it is positively refuted by the record.

In the opinion supporting the decision sought to be reviewed, the Oklahoma Supreme Court said:

> "* * * This record does not contain a copy of the return or report filed in this connection, but it is conceded that plaintiff thereby disclosed all of its taxable property located in School District No. 22 as enlarged by the annexations. We are not advised of the minuteness of detail with which it was so shown. *It is conceded, however, that the return did not disclose any effort or intention to further segregate the specific items of the property to lesser areas within the then District No.* 22.
>
> "Thus this property came under actual scrutiny of the assessing board and was officially acted upon by it, and it doubtless did, as was its duty, inform itself fully as to situs, extent and value of all such property."

Giving due consideration to the first part of the above quotation, it is clear that the effect of the last-quoted paragraph is to hold that the assessing board probably did establish that some of the petitioner's property had taxable situs within the areas of lesser taxing units within District No. 22. And its effect is to approve establishment of such taxable situs although the return did not disclose any segrega-

tion, to lesser included areas, of any of petitioner's property within District No. 22.

Furthermore, if due consideration be given to the pleadings and evidence in the record, it is clear that the effect of the last-quoted paragraph is to approve such action, if it was taken by the assessing board, although done without notice to petitioner, without its consent, and without affording any opportunity for hearing. In support of that statement, a brief analysis of the pertinent portions of the record is next presented.

Petitioner based its complaint on the alleged facts that its property had been established as having taxable situs in said areas without its consent, without notice, and without its being afforded an opportunity to be heard. See paragraph 20 of Plaintiff's First Amended Petition, R. 14.

Petitioner's witness, T. M. Markley, testified (R. 55) as follows:

Q. "Now, Mr. Markley, were those figures put on the tax rolls with the consent of the Public Service Corporation?

A. Absolutely not.

* * *

Q. You say the *first* you knew of it was *after* the supplemental certificate had been made?

A. Yes."

And petitioner's witness, Dan A. Rowe, the county assessor, testified (R. 44-45) as follows:

Q. "Mr. Rowe, before you entered these valuations and charges for levies of these disorganized districts on

the tax rolls, did you give any notice to this plaintiff that you intended to put that property on the roll as being within those four districts?

A. I had no authority giving any notice.

Q. You didn't give it?

A. I didn't, except by verbal conversation.

* * *

Q. Did you before you made that certificate talk to any representative of this plaintiff about that situation?

A. Ted (Markley) and I discussed it verbally.

Q. Before you made that certificate?

A. No, I told him what I was going to have to do—and even talked about if there wasn't some way to enjoin it for that particular year. There was several of them notified about it by 'phone and otherwise—probably discussed it with you, too."

In its opinion supporting the decision sought to be reviewed, the Oklahoma Supreme Court did not mention plaintiff's pleas that portions of its property had been established as having 1938 taxable situs within the areas of the disorganized districts without its consent, without notice, and without any opportunity being afforded for hearing. Neither did said court mention the evidence showing lack of consent, notice or opportunity to be heard. It was without authority to ignore those pleas and the undenied testimony sustaining them.

"When the evidence in a case, or on a material point, is undisputed, its legal effect presents a question of law and not of fact, and the verdict is subject to review, and the conclusion therein reached may be set aside if against the evidence. * * * So also the verdict will not be permitted to stand where it is directly contradictory of the

evidence; * * *, or against admissions; * * *." 4 C. J. 857; Evidence, § 2835.

Petitioner's property could not, without its consent, be assessed as having taxable situs in any taxing unit not disclosed on its return, except pursuant to notice and opportunity for hearing thereon, without depriving petitioner of substantial rights guaranteed by the Fourteenth Amendment to the Federal Constitution. *Central of Georgia Ry. Co.* v. *Wright*, 207 U. S. 127, 52 L. ed. 134.

VI. CONCLUSION

It is respectfully submitted that the record and authorities cited show that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing the opinion and decision of the Supreme Court of the State of Oklahoma and reversing said decision.

Respectfully submitted,

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September, 1943.
